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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 282.

BONWIT TELLER & COMPANY, *Petitioner*,

against

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

REPLY BRIEF FOR PETITIONER.

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Two points are discussed in the brief for the United States. They are stated as follows:

1. As no claim for refund was filed prior to April 1st, 1926, the Commissioner had no authority to allow the petitioner's claim.
2. Even if the Commissioner's allowance was authorized, this suit is barred by lapse of time.

It is obvious that the first point begs the principal question presented in petitioner's brief. It will not do to say, as the United States has said, that the Commissioner had no authority to allow the petitioner's claim, "because no claim for refund was filed prior to April 1st, 1926." The fact that such a claim was filed prior to April 1st, 1926, was in fact and of necessity determined by the Commissioner of Internal Revenue and was the basis of his allowance. It is attempted by a choice of words to transform and disguise the real question at issue. It cannot, however, be denied that a claim for refund was made, nor that it was filed prior to April 1st, 1926, and that when perfected afterwards at his request by the use of his prescribed form it was satisfactory to him. To say, therefore, that no claim for refund was filed, is but masking the contention of the United States that, upon the facts before him, the Commissioner should have reached a different conclusion and should have denied the claim for refund. Thus it is that the government seeks to review and reverse his action.

The main question must therefore be hurdled by the United States, before it is in a position to discuss the facts.

The Commissioner of Internal Revenue Acted Within the Scope of His Authority in Allowing the Claim for Refund.

If as we contend, the Commissioner alone is vested with exclusive authority to determine these questions on behalf of the United States, and if that determination in favor of the taxpayer is followed by a certifi-

cate of the allowance and the liability of the United States becomes fixed, and the claimant's right to payment established, clearly the details of what took place in the office of the Commissioner are utterly immaterial, and are of no further interest in any judicial proceeding to recover upon the allowance. This view has been precisely expressed in United States v. Kaufman, 96 U. S. 567, and United States v. Savings Bank, 104 U. S. 728, and Bank of Greencastle's case, 15 Ct. Cl. 225, cited and quoted from in the main brief.

The learned counsel for the government contend that United States v. Kaufman and United States v. Savings Bank hold that the allowance by the Commissioner creates an account stated and evidence of an implied contract upon which the taxpayer may sue the United States only when he acts *"with authority"*, and that the Bank of Greencastle's case and Woolner v. United States are to the same effect. We have no disposition to quarrel with that contention, for clearly he acted with authority in determining that the petitioner had over-paid the tax and was entitled to a refund thereof. The Government's contention is without point, unless it be shown that some other officer of the government was vested with the authority in question, or that the Commissioner was not empowered.

It will be noted that in the brief for the United States, the question of the conclusiveness of the Commissioner's determination and its exemption from review, and the questions of fact which were determined by the Commissioner are discussed together, although the consideration of the second question is not reached until the first has been disposed of. Indeed, as we pointed out before, the government

seems to assume the right to review the action of the Commissioner and discusses the propriety of his determination as if the other question had not first to be surmounted.

The Exact Form of a Claim Allowed by the Commissioner is Immaterial. It is Sufficient if He is Reasonably Apprised of the Grounds Therefor.

We pass now to the argument of the United States in support of its contention that the Commissioner should not have allowed the petitioner's claim. It does not survive analysis, nor is it supported by authority. It was said in the Court of Claims that no sufficient informal claim was filed with the Commissioner, and that therefore, it could not be perfected by a formal claim. It is urged here that neither the statutes nor the regulations provided for an informal claim and that a literal compliance with the statutory requirements may be insisted upon by the United States. We have pointed out that there are no statutory requirements governing a claim for refund. The statute says that over-paid taxes may be refunded within certain definite periods, *if a claim therefor is filed within certain limits of time.* Administratively, certain formalities are demanded. These are prescribed in the interest of orderly procedure and to enable the Commissioner to intelligently pass upon the claims. As pointed out in the petitioner's main brief, under Treasury Decision 4266, approved March 22nd, 1929, not only informal, but defective claims were held to be sufficient to toll the statute of limitations, if perfected by formal claims filed prior to April 1st, 1929. Informal claims have long been received and recognized and that such informalities

may be waived and a formal claim dispensed with, is no longer open to question since the decision of this Court in Tucker v. Alexander, 275 U. S. 228.

Upon this point, we cited in the main brief, Artmetal Construction Co. v. United States, and Zeller v. United States (pp. 27, 28). Since the preparation of our main brief these cases have been reversed by the Circuit Court of Appeals for the Second Circuit. An examination of the opinion of that Court will readily disclose that the reversal does not militate against the petitioner's position in regard to the propriety of the claim. In Artmetal Construction Co. v. United States, in which the main opinion was written (Standard Federal Tax Service, Volume 3, par. 9104), it is pointed out that the claim for refund was for $1.00, and that no ground for the refund was set up in the claim.

The Court, in discussing the facts, pointed out that the first indication of the character of the claim occurred after the statute had run; that on July 6th, plaintiff protested against an additional assessment and filed a brief in opposition demanding a special assessment for reasons then set forth, and the Court said, "it may be assumed that this was an adequate claim for refund on that ground, if in season."

The Court also points to the hopeless disagreement of the Courts on the subject referring to Felt & Tarrant v. United States, 37 Fed. (2d.) 977, recently argued in this Court where language as general as in the case then under consideration by the Circuit Court of Appeals, was held sufficient.

No purpose is to be served by discussing the divergent views of the various Courts as to what constitutes a claim that may be treated as an informal claim

and one which is insufficient for any purpose. It is recognized by all, that the primary purpose is to advise the Commissioner of the grounds of the claim. Not informality in the manner of statement, but the absence of any statement of claim was the subject of condemnation in Artmetal Construction Co. v. United States, *supra*, and cases of similar import. The instant case is far removed from the scope of such condemnation. The fact of over-payment of tax for 1919 had been determined in 1924, and the right to the refund conceded, except for the bar of the statute. The Commissioner was fully cognizant of the grounds of the plaintiff's claim and admitted their propriety. Unfortunately he had waited to determine the petitioner's liability until the statute had run.

It is asserted by the learned counsel for the government that when the amendment of 1925 was passed enabling the Commissioner to make the refund, there was no claim for such refund on file. This is clearly an error and cannot be reconciled with the Commissioner's letter of May 16th, in which he wrote to the taxpayer as follows:

> "An examination of your income tax return for the year ending January 31st, 1919, discloses an apparent over-assessment of tax for the year. It appears that the over-assessment cannot now be allowed, due to the limitation of time for allowance thereof, provided by Section 281 of the Revenue Act of 1924, unless an income and profits tax waiver is filed on or before June 15th, 1925."

If there was no claim pending and the case had been closed in November of 1924, why this letter?

It is said also by the government that the authority

or right of the Commissioner to grant the petitioner's claim is subject to review in this action and that its position is supported by Sections 608 and 610 of the Revenue Act of 1928. The act of 1928 was passed after the allowance of the claim in the instant case, and can have no application since it deals only with refunds made after its enactment. It is therefore fruitless to discuss its effect. The Commissioner has granted the refund. If the United States is of opinion that it may recover after payment that issue can be appropriately raised and met. It is not pertinent here.

We might reiterate that if such an action should be brought, the petitioner would at least be advised of the Government's attitude and contentions and would be in position to compel their proper presentation, and to meet them appropriately. It would not, as here, under a general traverse, be confronted with the necessity of proving the propriety of a determination upon which it bases its cause of action.

This Suit is One Upon a Claim Allowed by the Commissioner and is Not Barred by the Statute of Limitations.

The argument of Government Counsel on their second point is ingenious. It is said as to the petitioner's first cause of action, that it is one to recover taxes and that under Section 1113 of the Revenue Act of 1926 it is barred because not brought within five years after the payment of the tax and that, as to the second cause of action, while in form to recover upon an account stated or implied contract, it is, notwithstanding, brought for the recovery of taxes.

Section 1113 provides that no suit for the recovery of taxes shall be maintained unless there shall have been first filed with the Commissioner of Internal Revenue a claim for credit or refund. It is admitted by Government Counsel and Section 284 of the Revenue Act of 1926 makes it quite clear that once a claim for refund is filed, the Commissioner may take whatever time he chooses to pass upon it and the taxpayer may or may not await his pleasure. He may not sue within six months after the claim is filed unless the commissioner disallows the claim within that period. He may sue if he chooses after the expiration of six months without waiting for a determination by the Commissioner or he may await the determination of the claim by the Commissioner. The import of the Statute is that if the Commissioner does not determine the claim and the taxpayer chooses to sue without awaiting his determination, he must bring the action within five years from the payment of the tax. If he chooses to await the determination, he may bring the action at any time within two years after such determination. It seems clear that Section 1113 deals only with claims for refund which are either disallowed or upon which no action has been taken by the Commissioner and has no application to the instant case. Naturally there was no occasion to deal with a claim for refund once allowed. In the first place, a suit upon an allowed claim for refund could hardly be contemplated. Such suits are rare and result from misconceptions such as where an accounting officer of the Government refuses to honor the certificate of allowance of the Commissioner. Further, once the claim has been allowed, a new cause of action is created.

United States v. Kaufman, 96 U. S. 567.
United States v. Savings Bank, 104 U. S. 728.
Bank of Greencastle's case, 15 Ct. Cl. 225.

and others cited in the main brief.

However an examination of the petition for recovery in the case at bar shows that even the first cause of action while stating that the subject matter involved was income and profits taxes, based the right of recovery upon the allowance by the Commissioner of the claim for refund. The first and second causes of action are similar in their import but are stated in different form as is quite proper.

The United States appreciates that its contention is adversely disposed of in the Kaufman, East River Savings Bank and Bank of Greencastles cases if the action be upon an implied contract or an account stated but urges that it is nevertheless one for the recovery of taxes and therefore barred because not brought within five years from the time the tax was paid. One might as well say in an action on a promissory note that it is in reality one for the recovery for goods sold if such was the consideration for the note. The fallacy of all such argument becomes manifest when consideration is given to the fact that the amendment of 1925 perpetuated by the provisions of the Act of 1926 authorized the allowance by the Commissioner of the claim for refund filed before April 1, 1926, provided a waiver is filed. This would be approximately seven years after the tax has been paid and thus we find the Government contending that although the Commissioner is authorized, and in effect, directed to pay back all taxes erroneously

assessed or collected, seven years after payment, the taxpayer cannot sue to recover if he allows the claim and an accounting officer of the Government refuses to honor the allowance by the issuance of an appropriate check or if when suit is brought upon such an allowance in the court of claims, the defense of the statute of limitations is pleaded. Pursuing that line of reasoning further, it becomes apparent that if the Commissioner disallowed the claim for refund, the taxpayer could recover. This reduces the argument to absurdity.

It is clear that whatever may be said of the first cause of action, the second is upon the account stated and is not barred until 6 years after the cause of action accrued. The petition was filed in the Court of Claims in December of 1927, the year of allowance of the claims.

A demand for excessive interest cannot change the character of the action.

In the course of its discussion of its second point, counsel for the United States, refers to our reliance upon Peerless Paper Box Company v. Routzhan, 22 Fed. (2d) 459. Our citation of that case was upon a totally different point and has no application to the claim of the government that this suit was barred by statute.

The case of Jenkins Steamship Company v. Routzhan (cited p. 13 of the Government's brief) in which it is said the government's contention in the instant case is sustained, is clearly not in point and the Peerless Paper Box Company v. Routzhan was therein distinguished. The report on the case in Prentice Hall Tax Service is very meager, but it is said in the opinion that counsels claim that the action is to re-

cover for money ordered refunded on account of an over-payment of taxes for another year, is not borne out by the averments of the petition.

In William J. Friday & Company, Inc. v. United States (District Court for the Western District of Pennsylvania, Prentice Hall, Par. 615) relied upon by the government here, it appears that the action was not brought upon an allowance of a claim for refund as in the instant case. While it is true that in that case the Commissioner did determine that an over-payment had been made, he had not allowed a claim for refund therefor, since none of any character appears to have been filed.

The Court on demurrer by the United States, held that the action being for the recovery of taxes, could not be maintained without averments in the statement of claim that claim for refund had been filed as required by Section 1113 of the Revenue Act of 1926. The statute of limitations was not involved. The sufficiency of the complaint only was involved.

We respectfully contend that the action of the Commissioner in allowing the refund in this case is binding and conclusive upon the United States not having been in any appropriate action impeached for fraud or mistake; that the Court of Claims was without power or authority to review and reverse the Commissioner's determination in the absence of such impeachment; that if the determination is open to review, the reversal was improper and judgment should have been directed for the Petitioner.

Respectfully submitted,

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